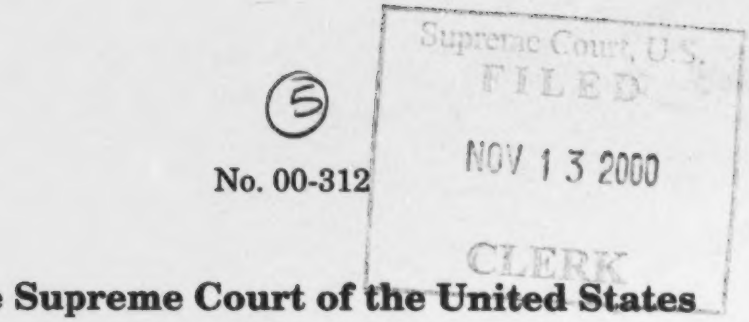

No. 00-312

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN, Petitioner,

v.

RONALD DEAN COMBS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The petition establishes the compelling basis for a writ of certiorari in this case: deep disagreement among the courts of appeals on an important and unresolved question of Fifth Amendment law, coupled with an equally important and unresolved question concerning Sixth Amendment claims of ineffective assistance of counsel. Nothing in Combs' opposition to the petition undermines this compelling basis for certiorari.

I. The circuit conflict on the Fifth Amendment issue is genuine and widespread.

As the Sixth Circuit discussed (App. 22a-24a), there is deep division among the courts of appeals on the question whether prosecutorial reliance on pre-*Miranda* silence violates the Fifth Amendment. Despite respondent's suggestion (Opp. 24-25), this conflict is not diminished by the fact that this question arises in different factual contexts.

As the petition observes (at 12-13), this Fifth Amendment issue can arise in situations of pure silence or, instead, where a defendant uttered words invoking his right to remain silent. It also can arise with respect to silence that occurs either before a defendant is taken into custody or after a defendant is in custody but before *Miranda* warnings. And it can arise in situations where the prosecution uses the pre-*Miranda* silence as affirmative evidence of a guilty conscience or, instead, to rebut a claim presented by the defense. These various permutations have exacerbated confusion among the courts of appeal, thus increasing the need for the Court to provide guidance on this Fifth Amendment issue.[1]

A. As a result of the deep confusion among the lower courts on this issue, we can discern at least five

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[1] The *amicus* brief of Illinois *et al.* (at 5 n.2, 9-10 n.6) notes that state courts also are sharply divided on this Fifth Amendment question.

distinct (and inconsistent) rules of Fifth Amendment law currently being applied to these pre-*Miranda* cases.

First, there is the categorical rule that prosecutorial reliance on silence that occurs before *Miranda* warnings does not violate the Fifth Amendment. *See United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).[2] *See also United States v. Williams*, 405 F.2d 14, 16 (4th Cir. 1968) (Fifth Amendment does not bar use in case-in-chief of defendant's pre-*Miranda* silence in response to preliminary investigative question by police, at scene of the crime); *United States v. Rederth*, 872 F.2d 255, 257-58 (8th Cir. 1989) (no violation for government's case-in-chief to include evidence of defendant's silence prior to *Miranda* warnings because the defendant received no "implicit affirmative assurance that a suspect's silence will not be used against him").

Second, there is the equally categorical but opposite rule, adopted by the Sixth Circuit here (App. 24a, 30a), that prosecutorial reliance on pre-*Miranda* silence in its case-in-chief always violates the Fifth Amendment.

Third, there is the rule that reliance on pre-*Miranda* silence is permissible only if it occurred before arrest. *See United States v. Velarde-Gomez*, 224 F.3d 1062, 1069-70, *modified on other grounds*, 2000 WL 1514639 (9th Cir. Oct. 13, 2000); *see also United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*").

Fourth, there is the rule that reliance on silence is permissible only if it is a "fair response" to what the

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[2] Combs attempts to distinguish *Rivera* as concerning only due process, and not the Fifth Amendment, but *United States v. Simon*, 964 F.2d 1082, 1086 n.* (11th Cir. 1992), expressly refutes this point. *See id.* (citing *Rivera* to reject "fifth amendment" claim and confirming categorical rule that "[s]ilence is admissible in the absence of *Miranda* warnings"). *Accord United States v. Campbell*, 223 F.3d 1286, 1290 (11th Cir. 2000).

defendant asserts at trial. *See United States v. Isaac*, 134 F.3d 199, 206 (3d Cir. 1998).[3]

Fifth, there is the rule that limits permissible rebuttal to cases in which the defendant has affirmatively uttered words invoking the right to remain silent. *See Thomas v. Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990).[4]

This cacophony among the circuits had not yet developed twenty years ago, when this Court noted that the issue remained unresolved. *See Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980). Now, however, there is a pressing need for the Court to address this ever-increasing disarray.

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[3] In an effort to distinguish *Isaac*, Combs says that he never attempted to use "his silence as a sword" (Opp. at 25), but that is precisely what he did. As explained in the petition (at 13), Combs put his cognitive capacity at issue at the outset of his trial, and he did so knowing that at the time of the shootings he had uttered words inconsistent with his assertion of mental incapacity. This effort to argue mental incapacity free from the burden of inconsistent evidence is an attempt to use a purported Fifth Amendment right "as a sword, rather than a shield." *Isaac*, 134 F.3d at 206.

[4] Combs cites *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1992), as repudiating *Thomas*, but it does not. First of all, there is no mention of *Thomas* in *Hernandez*. Second, *Hernandez* did not involve a situation, like *Thomas*, in which a defendant uttered words asking for a lawyer but then at trial claimed he was mentally incompetent when he uttered these words. *See Thomas*, 910 F.2d at 1414. Instead, *Hernandez* was a case of pure silence before warnings. *See Hernandez*, 948 F.2d at 322. And *Hernandez* did not involve the rebuttal use of silence in response to a claim made by the defendant at trial, but rather an unprovoked attempt by the prosecution to suggest that the defendant's silence at the time of arrest was probative of defendant's guilt. *Id.* at 323-24. Thus, *Hernandez* cannot be read as negating the proposition affirmed in *Thomas* that prosecutors may rely upon a defendant's express request for counsel, as long as it occurred before *Miranda* warnings, to rebut a defense of mental incapacity.

B. Combs contends (Opp. 21) that the Fifth Amendment question presented is not properly before the Court because the proceedings below did not specifically address the "public safety" exception to the *Miranda* warnings requirement. *See New York v. Quarles*, 467 U.S. 649 (1984) (exigencies at crime scene justify initial questioning without *Miranda* warnings). But that contention misses the key point for purposes of this Court's review on certiorari. The question presented concerns, not the scope of the "public safety" exception, but rather whether the Fifth Amendment bars evidence of pre-*Miranda* silence.

In addressing the question presented, this Court need not consider the scope of the "public safety" exception if the Court adopts the categorical rule that the Fifth Amendment simply does not apply to pre-*Miranda* silence. Rather, the "pubic safety" exception becomes relevant only if the Court were to adopt an intermediate rule that reliance on pre-*Miranda*-yet-post-custody silence is impermissible unless warnings were not required at the time. Only then would it become necessary to address whether *Miranda* warnings were required before Officer Ventre, upon discovering the live ammunition taped to Combs' torso and still not knowing the identity or whereabouts of who shot Combs, asked him what had happened.

Moreover, if the Court were to adopt this intermediate rule, the Court could remand to the court of appeals the subsidiary question concerning the scope of the "public safety" question. Alternatively, the Court could choose to address the subsidiary question as fairly subsumed within the question presented.[5] Either way, there is no doubt that the question presented itself is

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[5] *See* R. Stern *et al.*, Supreme Court Practice 338-39 (7th ed. 1993) (predicate issues may be regarded as fairly subsumed) (collecting cases). More recent cases are in accord. *See, e.g. Missouri v. Jenkins*, 515 U.S. 70, 84 (1995).

properly before the Court, as both parties argued it below and the court of appeals decided it in Combs' favor.[6]

C. Furthermore, there is a circuit conflict even if the Fifth Amendment issue is considered most narrowly, focusing on the particular facts of this case. The Sixth Circuit's decision here is irreconcilable with the Seventh Circuit's decision in *Thomas (see, supra,* at 3) on the precise circumstance in which a pre-*Miranda* invocation of the right to remain silent is used to rebut a defense of mental incapacity. Although *Thomas* largely concerned an issue of post-*Miranda* silence, this fact does not undermine the key point that *Thomas* also specifically pronounced that the rule of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), does not apply to a pre-*Miranda* situation.

The Seventh Circuit's opinion in *Thomas* is clear in this regard. When first noting that Thomas "asked for a lawyer . . . before he was given his *Miranda* warnings," the court stated that the prosecution's reliance on this request to rebut the defense of insanity "raises no problems." *Thomas*, 910 F.2d at 1414. Then, to confirm the constitutionally dispositive distinction between pre- and post-*Miranda* requests for counsel, the court repeated that "since the request was made before he was given his *Miranda* warnings this testimony did not violate *Greenfield*." *Id.* at 1416. This pronouncement, which remains good law in the Seventh Circuit (*see*, *supra*, n.4), is directly contrary to the Sixth Circuit's grant of habeas

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[6] As explained in the petition (at 19 n.23), this properly presented question is unaffected by the applicability of Ohio rules of evidence to the "Talk to my lawyer" statement. Although Combs attempts to raise this state-law issue as an obstacle to the question presented (Opp. 22), the dispositive point is that the Ohio Supreme Court held that counsel's failure to raise this state-law issue was harmless error (App. 278a) and, therefore, that failure cannot serve as *Strickland* prejudice (since no relief would have been available).

relief in this case, which involves facts indistinguishable from those in *Thomas*.

Thus, whether to address the confusion among the circuits on the issue of pre-*Miranda* silence generally or, alternatively, to resolve the specific split between the Sixth and Seventh Circuits on rebutting a defense of mental incapacity with the defendant's own pre-*Miranda* requests, this Court should grant certiorari in this case.[7]

II. The *Strickland* "prejudice" issue also deserves review.

Combs argues that *Williams v. Taylor*, 120 S.Ct. 1495 (2000), forecloses the petition's second question, which concerns the correct understanding of "prejudice" for purposes of ineffective-assistance-of-counsel claims. That argument, however, is incorrect. As explained in the petition (at 24), there is a significant difference between *Williams* and this case.

Williams involved counsel's failure to discover evidence *favorable to the defendant* that might well have caused the jury to vote against the death penalty. 120 S.Ct. at 1515-16. This case, by contrast, involves counsel's failure to anticipate the vulnerability of a defense witness to cross-examination that may elicit testimony *favorable to the prosecution* by corroborating the prosecution's own evidence of the defendant's guilt. While the death sentence in *Williams* was unreliable as a

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[7] Combs claims that "[t]here is no authority for the proposition that the mere assertion of a defense is sufficient to open the door for the admission of otherwise inadmissible evidence of silence." Opp. at 25 n.7. As the petition notes (at 14), however, in *United States v. Robinson*, 485 U.S. 25, 32 (1988), this Court explicitly stated that when "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege." The evident tension between *Robinson* and the decision below is an additional reason to grant certiorari.

result of counsel's failure, there is nothing unreliable about Combs' conviction as a result of counsel's failure to anticipate the prosecution's effective cross-examination. This night-and-day difference in the reliability of the jury verdicts goes to the heart of what *Strickland* "prejudice" is all about. *See Strickland v. Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). For this reason, the question whether a prosecution's effective cross-examination counts as "prejudicial" within the meaning of *Strickland* is very much an open issue after *Williams*.

An example illustrates the point. Suppose a defense counsel puts a witness on the stand failing to realize that the witness knows where the defendant hid the murder weapon. When this evidence comes out on cross-examination, it clinches the prosecution's case. Even so, the defendant did not suffer "prejudice" in the relevant sense, since the cross-examination confirmed the defendant's guilt, and thus the conviction should not be overturned as unreliable.

In this case, Dr. Fisher's testimony on cross-examination is equivalent to the unexpected revelation of the murder weapon's location. As Combs himself acknowledges, it confirmed that he is guilty of the crime charged: "Dr. Fisher's testimony, as well as the 'talk to my lawyer' statement, completely undermined Mr. Combs' ability to establish the absence of intent and purpose." Opp. 29. In other words, this evidence thoroughly refuted Combs' claim that he was innocent.[8]

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[8] Combs cites *State v. Slagle*, 65 Ohio St.3d 597, 605 N.E.2d 916 (Ohio 1992), for the proposition that the cross-examination of Dr. Fisher was improper under Ohio law. In fact, *Slagle* establishes the opposite. When an expert witness for the defense testifies that the defendant's judgment was impaired by alcoholism, the prosecution is entitled on cross-examination to "ask questions designed to elicit the [expert's] opinion" that the

The Sixth Amendment does not require a new trial when attorney error causes the jury to hear additional testimony that corroborates the prosecution's evidence of the defendant's guilt. This Court, moreover, should not leave unreviewed the Sixth Circuit's contrary decision. As the *amicus* brief of Illinois *et al.* emphasizes (at 18), the practical consequences of that decision will be to dampen a prosecutor's ardor for cross-examination and to make convictions vulnerable when prosecutors are effective in undermining claims of innocence.[9]

III. The remaining issues in the opposition were not grounds for the Sixth Circuit's judgment.

The Sixth Circuit rested its judgment solely on counsel's performance regarding two pieces of evidence: Dr. Fisher's testimony on cross-examination and the "Talk to my lawyer" statement. This is clear from the court's discussion of *Strickland* "prejudice," where it concludes that "defense counsel made two crucial errors" that qualify for habeas relief. App. 40a. Although the court elsewhere in its opinion criticized the performance of trial counsel in other respects, it pointedly limited its

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defendant's mental competency was not "affected by his alcoholism." *Id.* at 608. In expressly rejecting a claim that such cross-examination is improper, the Ohio Supreme Court asserted: "Cross-examination is 'permitted on all relevant matters and matters affecting credibility.'" *Id.* (quoting state rule of evidence).

[9] Contrary to Combs' assertion (Opp. 29), the prosecution had ample additional evidence of Combs' intent to murder Joan and Peggy Schoonover: he hunted them down, smashed in their car window, and paused before putting the gun to each of their heads. As the petition explains (at 25-26), this evidence makes the Sixth Circuit's "reasonable probability" determination plainly erroneous, and we ask the Court to reverse on this alternative ground if the Court does not adopt our understanding of *Strickland* prejudice.

finding of *Strickland* prejudice to these "two critical errors by defense counsel." App. 42a. As finding prejudice is essential to granting habeas relief, it necessarily follows that the court's judgment is confined to these two grounds. Thus, Combs is inaccurate in describing the Sixth Circuit's decision as resting on a "totality of constitutional deprivations" analysis. Opp. 16.

Perhaps because of this inaccuracy, Combs devotes much of his opposition to addressing issues that were not the basis of the Sixth Circuit's judgment and thus are not germane to the petition.[10] The two questions presented in the petition are properly focused on the two grounds upon which the Sixth Circuit rested its judgment. Because both questions are important and unsettled issues of federal constitutional law, and because the circuit conflict on the Fifth Amendment question is especially in need of resolution, this Court should grant the petition.

CONCLUSION

For these reasons, and those in the petition itself, the petition should be granted.

Respectfully submitted,

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November 2000

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[10] Each of these arguments, moreover, was rejected by the district court.